STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLIE L. SHERMAN,

Plaintiff-Appellant,

v

LONGFORD HEALTH SOURCES, INC., and GARY SEECH,

Defendants-Appellees.

UNPUBLISHED
June 14, 2005

No. 250866
Jackson Circuit Court
LC No. 00-001140-NZ

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff suffers from Charcot-Marie-Tooth disease, which is a form of progressive neuromuscular atrophy that severely limits her ability to use her extremities, precludes her from climbing stairs, and requires her to use a motorized scooter. She applied for a position as a counselor with defendant Longford Health Sources, Inc., a subcontractor that provides substance abuse treatment to inmates at the Michigan Department of Corrections' (MDOC) Cooper Street facility. The Cooper Street facility is a Level 1 (low-security) prison, but houses some inmates who have committed violent offenses, including murder, armed robbery, and rape and other sexual assaults. Plaintiff was interviewed, but was not offered the position. Plaintiff was later contacted by another Longford staff member for an interview. After the second scheduled interview was canceled under the apparent pretext of budget constraints, plaintiff filed suit alleging that defendants failed to hire her in violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*.

Defendants moved for summary disposition of plaintiff's entire case on the ground that plaintiff's disability disqualified her from performing a counseling job in a prison setting with or without reasonable accommodation. Defendants argued that plaintiff's disability posed a safety risk to her and others because as a counselor she was required to train and respond to security crises such as lock-downs and hostage-taking situations, which may include assisting corrections officers. Accordingly, her inability to protect herself and others rendered her unqualified for the counselor position. Defendants further argued that the counselors were required to work on the second floor of the prison, that there were no ramps or elevators, and defendants had no duty to

alter the physical structure to accommodate plaintiff because they were merely a program subcontractor.

We review a trial court's decision on a motion for summary disposition de novo. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden, supra* at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Nastal, supra* at 721.]

To survive defendants' motion, plaintiff had the burden of presenting sufficient evidence to overcome the substantial deference given to the employer's judgment of the job duties, *Peden v Detroit*, 470 Mich 195, 219; 680 NW2d 857 (2004). Although plaintiff disagreed with defendants' statements concerning the job duties of a counselor, she failed to support her contentions with admissible evidence. A party facing a motion for summary disposition brought under MCR 2.116(C)(10) is required to present evidentiary proofs creating a genuine issue of material fact for trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). The existence of a disputed fact must be established by admissible evidence, MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Maiden, supra* at 120.

The only evidence plaintiff submitted to support her position was her own affidavit, in which she averred that Dr. John Rushbrook of the MDOC Bureau of Health Care Services told her that an individual with a wheelchair would not have a problem performing the duties of a counselor. According to plaintiff, Rushbrook told her that counselors were not required to do "take-downs" or to "physically restrain" inmates as a requirement of their duties.[1] Plaintiff's hearsay evidence is insufficient to create a genuine issue for trial. *Peden, supra* at 222.

Plaintiff also averred in her affidavit that Rushmore stated that although the training school for counselors was not accessible for individuals in wheelchairs, MDOC would make accommodations for such accessibility. As discussed above, plaintiff's statement is insufficient to overcome defendants' motion for summary disposition. *Smith, supra* at 455-456 n 2. The trial court therefore did not err in granting defendants' motion for summary disposition.

We emphasize that this result stems from a lack of admissible evidence in support of plaintiff's claims, not from any obvious lack of merit of her claims. We disagree with defendants' argument, based on *Aikens v St Helena Hosp*, 843 F Supp 1329 (ND Cal, 1994), that

[1] Likewise, plaintiff averred that Maria Guizar of MDOC recruitment made similar statements.

they have no duty to accommodate plaintiff because they were merely a program subcontractor, and they had no ownership or control over the place providing the services. *Aikins* was decided under Title III of the Americans with Disabilities Act (ADA), 42 USC 12182(a),[2] which governs "public accommodations," and was decided on the basis of specific statutory language that does not apply in an employment discrimination case. The prohibition against employment discrimination in § 1202 of the PWDCRA is much broader than the ADA prohibition governing public accommodations. The holding in *Aikins* is therefore inapposite.

Moreover, the PWDCRA mandates that any contract to which the state is a party must contain a covenant not to discriminate against an applicant for employment. MCL 37.1209. The agreement between the MDOC and Western Michigan University, pursuant to which defendant offers substance abuse treatment, contains the required nondiscrimination provision. Essentially, contractors and subcontractors agree not to discriminate against any employee or applicant for employment, as provided in the PWDCRA.

According to plaintiff's complaint, she was interviewed by Seech for the counselor position on November 9, 1998. Seech told plaintiff that Longford planned to hire twenty counselors for this program. It was undisputed that, aside from her physical disability, plaintiff possessed the necessary credentials and education for the position. She was not hired. On January 13, 1999, another Longford staff member called plaintiff about interviewing for the counselor position, telling her that she had the exact qualifications sought for the position. When plaintiff explained that she had already interviewed with Seech, the staff member told her that there was no record that she had interviewed and that Longford had hired only eight of the twenty counselors needed. The staff member scheduled an interview with plaintiff for January 15, 1999. On the morning of the interview, the staff member called plaintiff and canceled the interview on the ground that his supervisor had overextended the budget for hiring counselors. However, on January 24, 1999, Longford placed another advertisement for the counseling positions. Given these facts, whether plaintiff could have succeeded on the merits of her discrimination claim absent her failure to overcome the motion for summary disposition is a question left unanswered.

Affirmed.

/*s*/ Janet T. Neff
/s/ Jessica R. Cooper

I concur in result only.

/s/ Brian K. Zahra

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[2] That provision states, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person *who owns, leases (or leases to), or operates a place of public accommodation*." [*Aikins*, *supra* at 1334 (emphasis added).]